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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, *Petitioner,*

vs.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, *Respondent.*

No. 78-119

STATE OF WASHINGTON, *Petitioner,*

vs.

UNITED STATES, *Respondent.*

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *Petitioner,*

vs.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER STATE OF WASHINGTON, PETITIONER PUGET SOUND GILLNETTERS ASSOCIATION, AND RESPONDENT WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION

RONALD A. ZUMBRUN
JOHN H. FINDLEY
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Amicus Curiae Pacific Legal Foundation.

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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This motion of the Pacific Legal Foundation for leave to file the annexed brief amicus curiae is respectfully made pursuant to Rule 42, consent to the filing of a brief having been granted by counsel for petitioner State of Washing-

ton, petitioner Puget Sound Gillnetters Association, and respondent Washington State Commercial Passenger Fishing Vessel Association, but withheld by counsel for all other parties involved in this action.

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Board has authorized the filing of this brief.

Pacific Legal Foundation is deeply concerned by the lower court actions in these consolidated cases in granting special privileges and immunities to a small fraction of persons to the detriment of all others based upon the rationale that Indian treaty rights may be superior to the Fifth Amendment of the United States Constitution. Further, there are grave concerns about the direction being taken by the courts below in contravention of the national policy of harmonizing the diverse elements of our society. Decisions which made it more profitable and grant more rights to those who remain apart from the mainstream of society can only fractionalize and splinter the United States and fly in the face of over two hundred years of judicial, legislative, and executive attempts to ensure that all persons living within the United States have equal rights, responsibilities, and opportunities.

Pacific Legal Foundation believes that these issues are of grave, national importance and that the parties to this action cannot adequately represent the interests of the public while at the same time representing their own, somewhat diverging interests.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed brief amicus curiae be granted.

Respectfully submitted,

RONALD A. ZUMBRUN
JOHN H. FINDLEY
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amicus Curiae
Pacific Legal Foundation.

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INTEREST OF AMICUS

The interest of amicus is set out in the preceding motion for leave to file this brief.

OPINIONS BELOW

The opinions herein consolidated for appeal are reported below as follows: *Washington State Commercial*

Passenger Fishing Vessel Association v. Tollefson, 89 Wash. 2d 276, 571 P.2d 1373 (1977); *United States v. Washington,* 573 F.2d 1118 and 573 F.2d 1123 (9th Cir. 1978); and *Puget Sound Gillnetters Association v. United States District Court for the Western District of Washington,* 573 F.2d 1123 (9th Cir. 1978).

INTRODUCTION

The facts of this case, as set forth in petitioner State of Washington's opening brief and herein adopted, raise several significant issues. Of these, the issue of whether the granting of fifty percent of the total of a commercial salmon fishery to a small minority of the people living in the State of Washington is proper in light of the Fifth and Fourteenth Amendments to the United States Constitution, and the issue of the nature of the relative sovereignty of Indian tribes, the States, and the United States are of vital importance with respect to the public interest.

These issues arise following protracted litigation brought by the United States on its own behalf and on behalf of several western Washington Indian tribes seeking a declaration of rights with respect to the legal authority of the State of Washington to regulate off-reservation, commercial fishing by Indian fishermen. The United States District Court for the Western District of Washington found that the State of Washington had no right to regulate off-reservation fishing by treaty right fishermen except to that extent necessary for conservation of fisheries resources, and further that the Indians had a right to the opportunity to catch fifty percent of all salmon considered

to be harvestable[1] in the entire northwestern Washington area. *United States v. Washington,* 384 F. Supp. 312, 342-43 (W.D. Wash. 1974). This latter conclusion, which in effect deprives many non-Indian and non-treaty Indian commercial salmon fishermen of their right to seek a livelihood at their chosen profession, was based upon Article III of the Treaty of Medicine Creek, and similar treaties, which stated:

> "'The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory ....'" *United States v. Washington,* 384 F.Supp. at 331.

Relying on the fact that this treaty as well as other treaties negotiated for the United States by Governor Isaac Stephens of the Washington Territory was made at arm's length with a "sovereign" Indian tribe, the district court construed the "in common" language to mean that the Indians had an absolute right to fifty percent of all salmon which would normally pass through the Indians' usual and accustomed grounds and stations. *United States v. Washington,* 384 F. Supp. at 343. In order to ensure that this number of fish did indeed pass through these areas, the court found it necessary to subtract from that portion remaining for the non-treaty fishermen the number of fish which had already been harvested at some prior point in their migration to their spawning redds. *United States v. Washington,* 384 F. Supp. at 344. The court of appeals

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[1]Harvestable salmon means the number of fish remaining to be taken by any and all fishermen, at usual and accustomed grounds and stations after deducting the number of fish required for spawning escapement and tribal needs. *United States v. Washington,* 384 F. Supp. 312, 343 (W.D. Wash. 1974).

upheld this decision in all respects save for not allowing a deduction for that number of fish taken by citizens of other states and nations beyond the territorial waters of Washington. *United States v. Washington,* 520 F.2d 676, 689 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976).

From this decision flow all three of the cases consolidated for appeal. The courts left it to the State to promulgate regulations to carry out the court's edicts and by doing so have placed the State in an impossible position. As a sovereign, the State of Washington is charged with a responsibility to all of its citizens to manage effectively its resources for their benefit, granting no special privileges and immunities, and protecting them from encroachment into their rights by other political subdivisions. In its capacity as a State, Washington is expected to fulfill the responsibilities given to it by the United States Constitution. The courts, by the simple expedient of characterizing the Indian tribes as co-equal, quasi sovereigns, have taken away the power of the State to manage its resources, provide and protect for its citizens and have forced it into a position contrary to the United States Constitution. It is of no small importance that the court of appeals feels that the State of Washington has approached the task of carrying out its directives with some reluctance. *Puget Sound Gillnetters,* 573 F.2d at 1128. It is in fact impossible and these decisions themselves violate the Fifth, Tenth, and Fourteenth Amendments.

The court of appeals decisions grant a status to Indian tribes which did not exist at the time of treaty negotiation. Further, they require the state to grant special privileges and immunities in violation of the Fourteenth Amendment.

Had the court of appeals properly characterized the nature of tribal sovereignty and given due regard to the responsibilities of the State to its citizens, there is little doubt that it would have found that the State of Washington is the proper party to manage its salmon fishery with due regard and responsibility to all its citizens be they treaty Indians, non-treaty Indians, or all others living within its borders.

ARGUMENT

I

THE NATURE OF TRIBAL SOVEREIGNTY WILL NOT SUPPORT TRIBAL REGULATION OF OFF-RESERVATION TREATY FISHING.

In a concurring opinion in *Puyallup Tribe, Inc. v. Washington Game Department,* 433 U.S. 165 (1977) (*Puyallup III*), Justice Blackman stated:

> "I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity as was enunciated in United States v United States Fidelity & Guaranty Co. 309 US 506, 84 L Ed 894, 60 S Ct 653 (1940). I am of the view that that doctrine may well merit re-examination in an appropriate case." *Puyallup III,* 433 U.S. at 178-79.

The present consolidated cases both directly and inferentially raise this doctrine of tribal immunity and even more directly the concept of tribal sovereignty, which underlies both tribal immunity and the continuing viability of treaties between the various Indian tribes and the United States Government. This is most certainly "an appropriate case" for a re-examination of the vitality and even the present day propriety of laws and concepts fashioned in times past

and intended for use under totally different circumstances. *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 563 (1916).

A. Tribal Sovereignty Is Not Absolute.

The concept of sovereignty spans an extremely broad range. It can be the absolute sovereignty of a nation depicted by the Court in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), or it can be the conditional sovereignty attributed to the states of the United States in *John E. Madden v. Kentucky*, 309 U.S. 83 (1939). Beyond these two parameters exist other examples of sovereignty. A municipal or county government can be said to enjoy a certain "sovereignty" because of its ability to enact ordinances and regulations. *See American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909). The captain of a ship at sea is a sovereign in consideration of his ability to rule absolutely the day-to-day functioning of his vessel and her crew. *See Southern Steamship Company v. National Labor Relations Board*, 316 U.S. 31, 42-46 (1942). A property owner can even be said to have certain sovereign attributes over his property. From all of these examples save that of an independent nation it can be readily seen that a political group or individual can be both a sovereign and a subject at the same time. The determinate factor will be the type of activity which is being considered.

The sovereignty often granted to Indian tribes or bands is not an absolute sovereignty. In some aspects, a tribe may enjoy sovereignty over some activities of the tribal members while on the reservation. *See McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1972); *United States*

v. Mazurie, 419 U.S. 544 (1975). In other aspects, the tribal entities must defer to the legitimate interests of the state (*Puyallup III*), or of the federal government (*United States v. Wheeler*, ... U.S. ....., 46 U.S.L.W. 4243 (1978)). Therefore, tribal sovereignty is, in fact, a limited authority, the scope of which depends upon the location and activity to be regulated.

B. Indian Tribes Were Never Considered Absolute, Independent Sovereigns.

Further support for the premise that Indian tribes are not to be considered sovereigns, able to regulate activity not occurring on Indian reservations, is readily apparent from a historical view of the initial characterization of the Indian tribes. Throughout the nineteenth century, the people of the United States were spreading throughout the territories in the spirit of Manifest Destiny. Possibly due to a sense of propriety, but more probably due to the lessons learned during the Indian wars, the United States Government entered into treaties with the Indian tribes to ease the way for settlement wherever possible. In the Pacific Northwest, Governor Isaac Stephens of the Washington Territory negotiated eleven different treaties for this purpose with the Indian bands of the area. *United States v. Washington*, 384 F. Supp. at 330. Although there was no reason to do so, Governor Stephens treated these Indian bands *as if they were* sovereigns. *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975). The court of appeals in *Puget Sound Gillnetters* recognized that this was not the sovereignty generally granted to an independent, foreign nation, but rather was, "the limited sovereignty of a domestic dependent nation." *Puget Sound*

Gillnetters, 573 F.2d at 1127. Even this characterization is somewhat less than accurate. Considering the facts surrounding the negotiation of these treaties, the sovereignty accorded to the various tribes of the Washington Territory might more properly be characterized as that which exists in a property owner facing eminent domain proceedings.

In *Late Corporation of Latter-Day Saints v. United States*, 136 U.S. 1, 42-3 (1890), the Court stated:

> "The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States."

The power to make all rules and regulations for any territory of the United States is specified by the Constitution, Article 4, Section 3. There was no need for the Congress to treat Indian tribes as sovereigns unless it was for the purpose of accommodation and ease in ensuring territorial expansion. It follows, therefore, that this initial sovereignty of the tribes of Washington was something less than that of an independent nation, and further that this status could not change without some subsequent congressional action. There has been action in this area, but far from granting a broader aspect to Indian sovereignty, Congress has evidenced a strong intent to abandon the concept altogether. In 1871, Congress enacted legislation doing away with the power of the United States to make treaties with Indians. In pertinent part it states:

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . ." 25 U.S.C. § 71.

Within the narrow confines of the question of whether or not Indian tribal sovereignty still exists, this statute provides a negative answer. Further, Congress has also enacted legislation making all Indians citizens of the United States. 8 U.S.C. § 1401(a)(2). These statutes clearly exhibit a congressional intent to make the Indian part of the mainstream of our society, rather than an intent to create a group of dependent, quasi sovereign nations living within, but not under jurisdiction of, the States of the United States. It must also be noted that the extension of citizenship to all Indians closely parallels the emancipation and citizenship granted to the black members of United States society through the Thirteenth, Fourteenth, and Fifteenth Amendments.

Throughout the long and arduous litigation leading to this appeal, the district court, and the court of appeals in turn, relied on the concept of tribal sovereignty to substantiate the holding that the State of Washington had no right to regulate off-reservation fishing by treaty right fishermen. The court of appeals in *Puget Sound Gillnetters* states:

> "Treaty fishers fish under the regulation of one quasi-sovereign, nontreaty fishers under the regulation of another." *Puget Sound Gillnetters*, 573 F.2d at 1128.

There can be only one rationale for this holding: the Indian tribes have been elevated to a status which they have never previously held. The tribes, through this holding, have been granted a sovereignty equal to that of each of the fifty States. The Tenth Amendment to the United States Constitution absolutely forbids either a character-

ization of the states as a quasi sovereign or the characterization of an Indian tribe as an equal of the States. The Tenth Amendment states:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This amendment makes it evident that the States are absolute sovereigns over all but that which is either granted to the federal government or that which is specifically denied to them by the Constitution. Indian tribes have never enjoyed this particular level of sovereignty nor is there any constitutional provision which may authorize it. On the contrary, the Constitution is specific in placing the Indian tribes under the regulatory control of the Congress. United States Constitution, Article I, Section 8, Clause 3.

This Court described the true status of sovereignty as regards Indian tribes in *Oliphant v. The Suquamish Indian Tribe,* ..... U.S. ....., 46 U.S.L.W. 4210, 4215 (1978).

> "'Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these two.' [Citation omitted.]"

C. The Treaties Granted No Sovereign Rights to the Indian Tribes.

The source of the present dispute is the "in common with" language of Article III of the Treaty of Medicine Creek:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory . . . ." *United States v. Washington,* 520 F.2d at 683.

By reading this language in context with the characterization of the Indian tribes as sovereigns the court of appeals created a fiction of a cotenancy in the off-reservation salmon fishery of Puget Sound. *United States v. Washington,* 520 F.2d at 685. When viewed in light of a dominant sovereignty existing in the territory, however, the meaning of the above clause changes. It does not reserve co-equal rights in the Washington Territory and in the Indian tribes to regulate a fishery, rather, it grants and reserves the right to all citizens of the territory, be they Indian or other, to an equal opportunity to catch fish. To use the words of the court of appeals, these "principles," applied in good faith, should answer most of the arguments in this dispute. *Puget Sound Gillnetters,* 573 F.2d at 1128. The court of appeals continues to state that the problem is then one of enforcement. Indeed, when it is necessary for two supposedly co-equal sovereigns to regulate a single fishery under the scrutiny of a judicial fish master, there is a problem of enforcement. A problem which might even lead the court to state that the State of Washington only, "enforced the district court's orders grudgingly at best." *Puget Sound Gillnetters,* 573 F.2d at 1128.

New York ex rel. Kennedy v. Becker, 241 U.S. 556 (1916), also dealt with the reservation of fishing rights in Indian treaties. It was argued in that case, as the court of appeals found here, that the reservation of fishing rights maintained and element of tribal sovereignty which thereby subjected the land itself "'to a joint property ownership

and the dual sovereignty of the two peoples, white and red.'" *Id.* at 563. This Court rejected that view finding that if neither whites nor the Indian tribe could exercise authority with respect to the other:

> "either would be free to destroy the subject of the power. Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both." *Id.*

This is the very danger noted by this Court in *Puyallup II* in holding that:

> "The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." *Washington Game Department v. The Puyallup Tribe,* 414 U.S. 44, 49 (1973) *(Puyallup II).*

II

ARTICLE THREE OF THE TREATY OF MEDICINE CREEK, AS INTERPRETED, VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Chief Justice Marshall in *M'Culloch v. Maryland* (US) 4 Wheat. 314 (1819), stated:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." *M'Culloch,* (US) 4 Wheat. at 423.

In the instant case, there exists a situation in which the Court is faced with a painful duty. It is not, however, the painful duty to find that the initial act of Congress, that of ratifying the treaties negotiated by Isaac Stephens, was not the law of the land, but rather, it is the duty to state that these treaties could not be the law of the land if the court of appeals interpretation is correct.

A. No Treaty May Violate or Amend the United States Constitution.

It is well established that Congress does not have the power to do by treaty that which it cannot do by statute. *Holden v. Joy,* (US) 17 Wall. 211 (1872). Further, there is no support for this proposition in the supremacy clause itself. The state court, in addressing this limitation on the clause, quoted an earlier opinion of this Court:

> "'There is nothing in this language [the supremacy clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.'" *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson,* 89 Wash.2d

276, 571 P.2d 1373, 1377, *quoting from Reid v. Covert,* 354 U.S. 1, 16 (1957).

The foregoing makes it clear that treaties must be measured against the Constitution and if it is found that a particular provision or an entire treaty violates one or another of the articles of the Constitution, it will be the duty of the courts to find that such treaty is not the law of the land. In the instant case, however, there is no more than the bare words of the treaties of 1855-56 to serve as a guide in the constitutional measure. There is in existence the interpretation of these treaties made by the United States District Court. The Supreme Court of the State of Washington addresses this point by stating:

> "If a treaty itself may not contravene constitutional provisions, it must follow that an interpretation of a treaty which leaves it open to constitutional objections, is likewise forbidden . . . ." *Id.*

B. The Granting of at Least Half of a Commercial Salmon Fishery Violates the Fifth Amendment Rights of All Other Citizens of Washington.

The District Court for the Western Division of Washington in *United States v. Washington,* 384 F. Supp. 312 (1974), in discussing the nature of the fishing rights of the treaty fishermen specifically found that:

> "The fishing right was reserved by the Indians and cannot be qualified by the state. The state has police power to regulate off reservation fishing only to the extent reasonable and necessary for conservation of the resource . . . . Additionally, state regulation must not discriminate against the Indians, and must meet appropriate due process standards." *United States v. Washington,* 384 F. Supp. 333.

The basis for this finding was the "in common with" language contained in most of the treaties in question here. However, from this seemingly innocuous statement, the district court found that it was necessary to apportion the fishery so that the reserved right of treaty fishermen to fish at all usual grounds and stations was meaningful. The manner in which this right was made meaningful was to require that at least fifty percent of the harvestable salmon available at a particular ground or station be reserved for tribal fishermen. *United States v. Washington,* 384 F. Supp. at 343. This is accomplished by limiting the amount of fish which might be caught by non-treaty fishermen prior to the time these fish reach the areas in question. This remedial judicial legislation amounts to a denial of due process to those who have lost the opportunity to fish "in common with" treaty rights fishermen. The Supreme Court of Washington points out the manifest injustice of the results of the court's edicts by showing that there are only 794 treaty rights fishermen commercially fishing for salmon while there are 6,600 non-treaty rights fishermen attempting to pursue the same profession as well as 283,650 sports fishermen. *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson,* 89 Wash. 2d 276, 571 P.2d 1373, 1376. This type of apportionment is unprecedented.

Perhaps some understanding for the rationale behind the district court's decision may be found in Associate Justice Utter's dissenting opinion in *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson.* This opinion and the opinion of the district court in *United States v. Washington* rely heavily on the

Court's decision in *United States v. Winans,* 198 U.S. 371 (1905). In construing *Winans* Justice Utter states:

> "*Winans* stands unequivocally for the proposition that 'in common with' does not limit Indian fishing rights to those which others may also exercise. . . . the *Winans* decision is itself a clear recognition of the separate character *and separate source* of Indian treaty rights; while the ordinary United States citizen has rights as defined by the constitution and subject to limitation by the proper exercise of the police power of the states, treaty Indians *retain rights as established under treaty* prior to the grant of United States citizenship to the Indians." *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson,* 89 Wash. 2d 276, 571 P.2d 1373, 1381 (emphasis in original).

The fact that a "right" has been granted by treaty does not make it superior to those rights established by the Constitution. As was noted in *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73 (1977), this Court has not been deterred, "particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment." *Id.* at 84.

Considering the nature of tribal sovereignty as previously discussed, and considering the fact that the supreme law of the United States is the Constitution, under which all laws and treaties must be tested, Justice Utter's rationale has no basis in law or in logic. Nonetheless, the non-treaty fishermen must have a right to pursue salmon commercially in order for there to be a denial of the Fifth Amendment. Without this right, then, as both the district

court and the court of appeals suggest, the other citizens of the State of Washington have a mere privilege against which a reserved right has priority and against which no denial of equal protection can be claimed. *United States v. Washington,* 384 F. Supp. at 332.

C. Non-Treaty Fishermen Have the Absolute Right Secured by the Fifth Amendment to Pursue any Lawful Profession Including Commercial Salmon Fishing.

The Fifth Amendment's due process clause includes several enumerated rights which cannot be abridged. Included in these rights is that of liberty. On several occasions the Court has determined that the concept of liberty in the Fifth Amendment includes the liberty to pursue a lawful profession free from unreasonable governmental control or restriction. *See Greene v. McElroy,* 360 U.S. 474 (1959); *Dent v. West Virginia,* 129 U.S. 114 (1889); *Cf. United States v. Briggs,* 514 F.2d 794 (5th Cir. 1975). The concept of liberty and the right to make a living at a chosen trade or profession, taken together, is basic to the democratic nature of our society. In addressing the question of whether a licensing statute requiring that doctors had to be certificated by the State of West Virginia prior to practicing medicine, Justice Field stated:

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years

> of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken." *Dent v. West Virginia,* 129 U.S. at 121.

Justice Field's comments are particularly applicable to the present situation. The present controversy is not whether the Indians have a right to subsistence fishing on their own reservations or at off-reservation grounds and stations, nor is it a controversy of whether the State may exact licensing fees from Indian fishermen. The controversy surrounds a *commercial* salmon fishery in which the treaty and the non-treaty fishermen have equal rights, as guaranteed by the Fifth Amendment and by the treaties themselves. That such rights exist in the non-treaty fishing community is made so clear in the *Puyallup* decision that it is difficult to understand how it can be questioned. This Court held in *Puyallup II:*

> "Moreover, the *right* to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' Certainly the *right* of the latter may be regulated. And we see no reason why the right of the Indians' may not also be regulated by an appropriate exercise of the police power of the State." 391 U.S. at 398 (emphasis added).

Similarly, in *Puyallup III,* this Court noted that if treaty fishermen were allowed unrestrained on-reservation fishing rights, "the treaty fishermen could totally frustrate both the jurisdiction of the Washington courts and the *rights* of the non-Indian citizens recognized in the Treaty

of Medicine Creek." 433 U.S. at 176 (footnote omitted, emphasis added).

These decisions hold not only that the non-treaty citizens have fishing rights, but that these rights are recognized in the very treaty which is claimed to grant rights only to treaty Indians.

D. Promoting Tribal Separatism Contravenes National Policy.

There can be little doubt that an Indian would much rather be considered a member of a recognized tribe than a fully integrated citizen of the United States when consideration is given to the increased benefits thereby granted. The simplest of economics dictates this result. This is not, however, consistent with the policies of assimilation which have been practiced by the United States from its beginnings. In *Organized Village of Kake v. Egan,* 369 U.S. 60 (1962), this Court traced the history of the attitudes of the United States government towards Indian separatism, as follows:

> "The general notion drawn from Chief Justice Marshall's opinion in Worcester v. Georgia (US) 6 Pet 515, 561 . . . Kansas Indians (Blue Jacket v. Johnson County) (US) 5 Wall 737 . . . and New York Indians (Fellows v. Denniston) (US) 5 Wall 761 . . . that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it

> was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law . . . ." *Organized Village of Kake*, 369 U.S. at 72.

In 1934 a new tack was taken in relations with Indians by permitting Indian tribes to establish themselves as federal corporations. *Id.* at 73. "The result of this policy was that the influence of state law increased rather than diminished" (*Id.*), as exemplified by the Court's listing of inroads into the sole jurisdiction of the Indian tribes both on and off the reservation. *Id.*

The thrust of that decision was that there is a definite congressional intent to assimilate the Indians of the United States into the common society, an intent consistent with the inclusion of all others who have entered this country as either willing or unwilling emigrants. This Court has made clear that Indians are not destined to retain a status of perpetual federal wardship. *Williams v. Lee,* 358 U.S. 217, 220-21 (1959). It makes little sense to state that the source of Indian rights is separate from the constitutional source of the rights of ordinary citizens (*Washington State Commercial Passenger Fishing Vessel Association*, 89 Wash. 2d 276, 571 P.2d 1373, 1381, Justice Utter, dissenting) when it is this same Constitution which grants its concomitant civil, political, social, and cultural rights, protections, and benefits to United States citizens. The final irony is that the Indian who earlier abandoned his tribal origins and became a citizen of the United States and the State of Washington is the loser. This Indian, although sharing a common heritage and possible lineage with

treaty-rights Indians, may now be denied his Fifth Amendment rights to seek a commercial fishing profession for salmon merely because he took the path of assimilation paved by Congress.

CONCLUSION

The three cases consolidated for review present questions which transcend their facts. They raise questions of national policy with regard to whether or not the United States is to be composed of one, assimilated society or whether this society is to become increasingly fractionalized and segregated as special interest groups promote their own causes. The cases raise questions about the supremacy of the United States Constitution over treaties, acts of Congress, judicial decisions, and judicial orders. They raise questions about the ability of the separate States effectively to govern their respective territories as guaranteed by the Tenth Amendment, and they raise serious questions about the present vitality of the equal protection of all citizens of the United States.

These questions, after more than 200 years of national growth and prosperity, should no longer have to be asked. If allowed to stand, the decision of the court of appeals will provide no answers. These decisions can only promote the shredding of the fabric of our society. In light of these deep social, cultural, and political considerations, and for the reasons set forth above, amicus curiae Pacific Legal Foundation urges this Court to find that all citizens of the United States, be they Indians living under treaty status, Indians living as integrated members of society, or any

other citizen of the United States, are subject to the full range of the burdens and benefits of the United States Constitution and that the separate States of the United States have the right to govern their territories subject only to those powers granted to the federal government or specifically denied them by the Constitution.

Respectfully submitted,

RONALD A. ZUMBRUN
JOHN H. FINDLEY
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Amicus Curiae
Pacific Legal Foundation.

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